IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 254 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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GOVINDBHAI NATHABHAI KOLI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Revision Application No. 254 of 2001

MR KAMLESH B MEHTA for Petitioner No. 1

MR BD DESAI Ld. APP for Respondent No. 1

CORAM : MR.JUSTICE C.K.BUCH

Date of decision: 08/04/2002

ORAL JUDGEMENT

The applicant -ori. accused of the offence punishable under sec. 279, 337 and 338 of IPC and under sec. 112 and 116 of the Motor Vehicles Act.

According to the prosecution, the applicant has committed this offence on 15.11.1987 at about 5.00AM on a State High Way leading towards the town Junagadh. The vehicle driven by the applicant, a motor truck loaded with Sugarcane was coming from Junagadh and proceedings towards Choki, i.e. opposite direction. At the spot of accident, the vehicle driven by the applicant dashed and brushed with a motor vehicle driven by the SRP Constable who was carrying newly recruited police constables in the

SRP Force to Junagadh as they were to attend training camp of rifle shooting.

On careful consideration of the averments of the charge-sheet i.e. report filed by the Police under sec. 173 of CrPC, the deposition of the complainant and other documentary evidence available on record, it is clear that the vehicle driven by the applicant has never dashed with the other vehicle coming from the opposite direction but the sugarcane loaded in the vehicle driven by the present applicant had caused some damage to the vehicle namely the truck of SRP Force. This court is not supposed to deal with the aspect whether the police constable driving the SRP truck was authorized to drive that truck or not, because these aspects are not much relevant in view of the case of the prosecution or defence put forward before the trial court.

As the applicant accused was charge-sheeted and a Criminal Case no. 2189 of 1988 was registered in the Court of Chief Judicial Magistrate, Junagadh and at the conclusion of the trial, the ld. Chief Judicial Magistrate convicted the accused holding him guilty of all the offence for which he was charge-sheeted vide judgment dated 18.9.1995. Copy of the judgment of the trial court is available on record vide Annexure-A for appreciation. Appeal preferred by the present applicant provided under sec. 374 of CrPC being Criminal Appeal No. 14/1995 was entertained on merit, and Ld. Sessions Judge dismissed the appeal. The judgment of the Sessions Court is on record vide Annexure-B. The impugned judgment dated 30.5.2001 and the finding recorded by the Ld. Chief Judicial Magistrate both are under challenge by this revision application.

Two concurrent findings on fact recorded against the present applicant is under challenge. So, unless the apparent illegality or manifest error is brought to the notice of this Court, this court, as per the settled law is not supposed to disturb the finding of fact recorded.

Ld. Counsel for the applicant has taken this Court through the entire oral as well as documentary evidence led by the prosecution in reference to the grounds of memo of revision and has argued that basic rules of appreciation of evidence has been ignored by both the courts below and the findings recorded by both the courts below are mainly based on surmises and conjectures. The apparent facts which were on record or the aspects for which both the courts below were able to take judicial notice, but failed in doing so. It is

submitted by Mr. Mehta that both the vehicles were coming from opposite direction. This is not a case of heading collusion. The applicant has not been been prosecuted for loading the material for which he can be said to be a driver of a over-loaded vehicle. Both the Courts are carried away by three main facts; namely (1) young police recruitee sustained injury, (2) one vehicle being police vehicle, sustained damage, and (3) fairness in such case must be there , in early morning police driver may not commit mistake. It was a month of November, so it must be very early morning and, therefore, there must be complete darkness on the highway. Both the vehicles were with the head lights on. When two vehicles crossing each other with full head lights should take utmost care to see that both the vehicles crosses by keeping a reasonable distance. As the vehicle driven by the applicant was loaded with sugarcane and some part of the sugarcane were abutting out side the body of the truck, the applicant was bound to keep a reasonable distance from the vehicle coming from the opposite direction. It was not possible for any prosecution witness to judge the speed of the vehicle driven by the present applicant. No cogent reasons has assigned by both the courts below as to how the evidence of these witnesses have been assessed qua the speed of the vehicle driven by the present applicant, on the contrary, there is evidence on record to show that even as per some prosecution witnesses who were passengers in the SRP truck that the truck driven by the SRP Police constable was with high speed. The width of the road is not specifically proved by the prosecution. It was the equal responsibility of the driver of the vehicle coming from the opposite direction. Mr. Mehta has rightly argued that this is a case of error of judgment on the part of both the drivers as both the vehicles themselves have brushed each other. Merely because some SRP constables sustained injuries and the vehicle coming from opposite direction was driven by the police constable and owned by the State Government, the courts below ought not to have jumped to a conclusion that the applicant is responsible for rash or negligent driving. There is no evidence as to rashness on the part of the applicant. It is in the evidence that newly recruited SRP Constables had sustained injuries because of the sugarcane loaded in the truck driven by the applicant and not because of hit given by the body of the truck driven by the applicant. It is also in the evidence that immediately after the alleged accident, the applicant had stopped his truck and it had stopped just after some feet. This fact itself indicates that the vehicle driven by the applicant must not be with excessive speed. This fact is also

indicative of one aspect that the applicant must have applied brake very well in time. None of these two vehicles had left the road. The injuries sustained by the victim of a vehicular accident by itself cannot be used as evidence adverse to the accused. The nature of the injury sustained by the victim of vehicular accident is relevant in assessing the quantum of negligence or rashness in a case of turtling the vehicle or a case of head on collusion. It is important to note that the driver of SRP Force has not sustained any grievous injury. The conduct of the accused immediately after accident is also relevant. It is on record that after immediately stopping his vehicle, the applicant had got down from his vehicle and had replied all the queries raised by the PSI travelling in the very SRP Truck. The some newly recruited constable has been examined and not this P.S.I. A person who was able to judge the speed of the vehicle in which he was travelling and reasonably assess the speed of the vehicle coming from the opposite direction when not examined, how the Court below reached to a conclusion that the deposition of the prosecution witnesses who were travelling in the back body of the SRP truck had rightly assess the speed of the truck coming from the opposite direction. Non examination of PSI by the prosecution is an important lacuna because the version of the driver of the SRP truck is a version of an interested person. The driver of the SRP truck Bhana Rao Moti Rao is the complainant and his status is of a partison witness. The say of this driver ought not to have been accepted as gospel truth without sufficient corroboration. The version of this witness has not been corroborated either by panchanama of the scene of the offence or by the panchas of the panchanama prepared by the Investigating Agency or any other reliable witness.

The negligent first in such cases should be established and the prosecution is obliged to prove that the negligence on the part of the present applicant was a criminal negligence punishable under sec. 279 of IPC. The circumstance available on record, on the contrary, suggests that the sugarcane loaded in the truck driven by the present applicant must be proceeding to the destination with a reasonable speed and it was not safe for the driver himself to drive his vehicle with much or high speed.

Ld. counsel appearing for the applicant has supplied a set (i.e. paper-book) of the evidence appreciated by both the courts below. The panchnama of the scene of the offence shows that at the spot of the accident the road is in the width of 20 to 22 ft. and

this road had kachcha strip in the width of 3 ft. and 8 inches on both the sides of the roads. It is experienced that every driver has tendency to drive the vehicle in the middle of the road especially when there is moderate traffic or less traffic and again this is a matter of personal perception. The panchnama of the scene of the occurrence is totally silent that after the accident, after how many ft. SRP truck could stop. The SRP Truck was carrying around 40 recruitees. Some sugarcane pieces had fallen in the body of the truck driven by the complainant SRP Constable. The deposition of PW-5 Chandrasinh Motibhai exh. 14, has not been considered by both the courts below in correct perspective. It is in the evidence of this witness that glasses of SRP truck had broken, and body of the SRP truck was also damaged in the accident. So, the broken pieces of the glass lying on the road could have indicated the exact spot of accident but the panchanama of the scene of the occurrence is totally silent. Examination-in-Chief of all eye witnesses and investigating agency does not tell anything on this aspect. The complainant, who was present when the panchnama was prepared had also not indicated this aspect to the Investigating Officer. Of course, this conduct of the complainant has not been brought to his notice during the course of his cross-examination but when PW-5 Chandrasinh has stated in his evidence to the effect that the driver of the truck carrying the sugarcane was not driving the truck with excessive speed then the trial court as well as the Sessions Court should have considered the case of the applicant whether he can be granted benefit of doubt. In the cross-examination, this witness has specifically stated that, "it is not true that the driver of the truck carrying the sugarcane was driving it with speed." This witness has also said that after the accident, the truck in which he was travelling had stopped after some distance. The neligence on the part of the present applicant only that he was driving the truck at the relevant point of time, had projection of the loaded material on the road side (i.e. out of body of the vehicle). Mere carrying the agricultural produce leading out side the body of the motor vehicle itself is not an offence punishable under sec. 279 or 337 or 338 of IPC. There are probabilities at the time of accident, the manner in which the accident has occurred, part of the body of the truck damaged driven by the SRP Constable must have brushed with the offending truck.

Non-examination of PSI travelling in the driver's cabin of SRP Truck and the say of two important prosecution witnesses namely Chandrasinh Motibhai and

Devendra Laxmidas, the trial court ought to have acquitted the accused giving him benefits of doubt holding that this is an error of judgment on the part of both the drivers when their respective vehicles were crossing each other in the early morning and both have equally failed in keeping the reasonable distance between the two vehicles and checking their speed to dead slow speed.

This is not a case of driving a motor vehicle with excessive speed on the part of the applicant. The error of judgment in such a cases are cases of negligence but not of culpable criminal negligence punishable under sec. 279 or 337 of IPC or the offence punishable under sec. 112 and 116 of the M.V. Act which are non-cognizable offences. Mr. Mehta has fairly submitted that the only error on the part of the present applicant was that he was driving the motor vehicle namely the truck which had some projection as the sugarcane were loaded. According to Mr. Mehta this is not a case of reckless driving. Utmost, it can be said to be driving in a dangerous contingency and, the applicant ought to have refused to drive the vehicle which had projected loading. Mr. Mehta has submitted that it is difficult for the drivers to refuse the order and direction of his master or the the owner of the vehicle as they are always under apprehension to lose their daily job or employment. But this say cannot be taken as a valid defence in such criminal proceedings. It would not be proper or legal to say that when a person is held responsible for the offence punishable under sec. 116 of MV Act, he should be held liable under sec. 337 of IPC because both these offences are of independent nature. Because the offence punishable under sec. 337 is an aggravated form of the offence punishable under sec. 336 of IPC. To bring on the charge of the offence punishable under sec. 337 of IPC, the prosecution has to establish that the accused did some act rashlessly or negligently and that act has endangered to human life or personal safety of others. In the present case, there is no evidence that the accused had acted in a rash or negligent manner which by itself was an act endangering to human life or personal safety of others. I agree that omissions is also an act. The hurt caused to some persons in the present event is not because of the act of the present applicant only but is the result of the error of judgment on the part of both the drivers. When there are probabilities that the driver of SRP truck must have contributed to the accident than it was not be safe for the court to convict the present applicant for the offence punishable under sec. 337 or 338 of IPC.

For short, both the courts below have failed in appreciating the evidence in correct perspective and linking accused with the offence for which he has been held guilty, except the offence punishable under sec. 116 of MV Act. It is the duty of the trial court to record positive finding, in reference to the evidence available on record that particular set of fact is accepted to be proved and that facts are sufficient to link the accused with the crime for which he has been charge-sheeted or tried. In absence of such positive finding, it would not be legal to say that the finding recorded by the Court is either legal or correct. The explanation offered by the accused under sec. 313 has been totally ignored by the trial court. Ld. Sessions Judge, on scrutiny of evidence could have allowed the appeal.

The Court feels that both the courts below have committed grave error in ignoring the basic principle of criminal jurisprudence and law relating to the appreciation of evidence. The conclusion arrived at by both the courts below are not well founded. So, this revision application shall have to be partly allowed and, therefore, this revision application is partly allowed. The order of conviction recorded by the trial court and confirmed by the Court of Sessions shall have to be modified.

The applicant- accused is hereby ordered to be acquitted for the offence punishable under sec. 279, 337 and 338 of IPC and under sec. 112 of M.V. Act. However, the conviction recorded by the trial court for the offence punishable under sec. 116 of the Motor Vehicles Act and confirmed by the Sessions Court is not required to be disturbed.

Ld APP Mr. BD Desai has rightly pointed out that the trial court has not inflicted any formal punishment or fine for the offence punishable under sec. 112 or sec. 116 of Motor Vehicles Act. If the conviction of the accused remains confirmed on dismissal of the revision application for any of this part, than this Court should order the applicant-accused to pay the amount of fine, after offering an opportunity as provided under the Code or for that limited purpose, the matter can be sent back to the Court of Chief Judicial Magistrate, so that ld. Chief Judicial Magistrate can call the accused and after offering an opportunity of being heard can inflict appropriate punishment. Submission of Mr. Desai is absolutely in accordance with

the procedure and law prescribed, but this Court is bound to take into consideration three important aspects; (i) the incident is very old the same has occurred in the year 1987 and the trial concluded after more than seven years i.e. in the year 1995 and ultimately the appeal was heard and decided again after 5 years i.e. in the year 2001. So, if the matter is sent back for a limited purpose to the trial court would protract litigation further, (ii) the accused is acquitted in all substantive offence for which he has been charged by this court and (iii) the applicant is a poor driver and if token punishment prescribed under the M.V. Act is imposed, no opportunity is required to be offered as per the settled legal proposition.

So far as the provisions of sec. 116 of MV Act (Old) is concerned, only maximum punishment is prescribed. Ld. counsel Mr. Mehta submits that a fine of Rs. 250/ if imposed, than the present applicant is ready to pay fine of Rs. 250, and in default, he is ready to undergo appropriate punishment prescribed by this Court. Formal hearing on this point is not necessary.

The applicant-accused is therefore, ordered to pay fine of Rs. 250/ for the offence punishable under sec. 116 of the MV Act and, in default, he is directed to under-go S/I for 5 days.

It is submitted by Mr. Mehta that the applicant accused has already paid total amount of fine of Rs. 1000/- for the three different offences as per the receipt mark 1/1. This shall have to be refunded to the appellant.

The applicant-accused is directed to pay up the amount of Rs. 250/ to the trial court, however, the fine paid by the present appellant-accused on the date of conviction i.e. 18.9.1995 be refunded. The applicant-accused is granted time to pay up the amount of fine within 30 days from the date of receipt of the writ of this order, failing which the bailable warrant be issued, so that the applicant-accused can be sent to prison to undergo the imprisonment provided in default of payment of fine.

Order accordingly.

This criminal revision application stands disposed of accordingly.

(C.K. BUCH, J.)

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